STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
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March 29, 1996

VIA FEDERAL EXPRESS

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

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Re: CS Docket No. 96-46
CC Docket No. 87-266 (Terminated)

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed postage pre-paid envelope.

Yours truly,

Mary Mack Adu

Mary Mack Adu
Attorney for California

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Enclosures

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	
	)	
	)	
Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266 (Terminated)
	)	

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby submit these comments in the above-docketed proceeding.

In its Notice of Proposed Rulemaking ("NPRM"), the Commission seeks comments on the best method of implementing the statutory language in §653(b)(1)(A) and (B), consistent with Congress' goals of promoting competition, investment, and consumer choice. The Commission tentatively concludes that the prohibition against discrimination with respect to carriage does not require the Commission to prohibit an open video system operator's participation in the allocation of channel capacity and, therefore, open video system operators should be allowed to administer the allocation of channel capacity.

The Commission also asks what regulations it should adopt to ensure that the open video system operator allocates capacity on

a nondiscriminatory basis (NPRM, ¶12). The topic of notice is another area in which the Commission invites comments. It specifically asks what procedures the Commission should adopt for an open video system operator to follow in notifying video programming providers that it intends to establish an open video system. In addition, the Commission seeks comments on what legal standard to adopt in evaluating claims of unjust or unreasonable discrimination. Another line of inquiry posed by the Commission is what information should be provided by the operator to subscribers for the purposes of selecting programming on the open video system (NPRM, ¶47 et seq.).

The CPUC addresses each of these areas of inquiry below.

I. SOME SAFEGUARDS MAY BE APPROPRIATE TO ENSURE NONDISCRIMINATION WITH REGARD TO CARRIAGE AND THE RATES, TERMS, AND CONDITIONS THEREOF.

The 1996 Act requires the Commission to prescribe regulations that prohibit open video system operators from discriminating with regard to carriage, while also ensuring that the rates, terms and conditions for carriage are just and reasonable, as provided by Section 653(b)(1)(A) of the Act:

> " (1) Regulations required.--Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary (including any reconsideration) to prescribe regulations --
>
> (A) except as required pursuant to section 611, 614, or 615, prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system, and ensure that the rates, terms, and conditions for such carriage are just and reasonable, and

are not unjustly or unreasonably discriminatory...."

In this NPRM, the Commission requests comments on the best method for implementing the above statutory language so that it comports with Congress' goals of promoting competition, investment, and consumer choice (NPRM, ¶11). The Commission tentatively concludes that the prohibition against discrimination with respect to carriage does not require the Commission to prohibit an open video system operator's participation in the allocation of channel capacity. The Commission further concludes that the system operator should be allowed to administer the allocation of channel capacity. (Id.) While the outright exclusion of a system operator from participation in the allocation of channel capacity may not be desirable or practical, it is another matter to permit the system operator to administer the allocation of channel capacity - at least not without some safeguards in place.

The 1996 Act offers telephone companies several options for entering and competing in the video marketplace. This would appear to conform with its general goal of "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." NPRM, ¶2. The entry requirements for telephone companies would allow them to provide video programming, not as a common carrier, but

as a cable system with reduced regulation (§651(a)(3); §653(a)(1), (c)).[1]

While market entry appears to be facilitated by the requirements of 651 and 653, implementing regulations should ensure that once a telephone company is certificated as a system operator and has achieved entry into the video marketplace, there are sufficient safeguards in place to prevent the new system operators from discriminating against others seeking entry.[2] Congress hopes that the reduced regulatory approach will encourage common carriers to deploy open video systems. Another reason for reducing regulation was the recognition that common carriers will be "new" entrants in established video programming markets. Conference Report at 178. While the hope is that the reduced regulatory approach will encourage common carriers to deploy open systems, the incentive and opportunity system operators will have to advantage affiliated programming providers cannot be overlooked. In addition, although common carriers will be new entrants in the video marketplace, their dominance in other communications markets gives them resources and leverage that new entrants typically would not have.

The challenge is to put into place regulations that act as a deterrent to discrimination by the system operator, while at the

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1. Some of the Title VI regulations that would not apply include: 1) Section 612 - leased access obligations; 2) Section 621 and 622 - franchise requirements and fees; and 3) Section 632 - consumer protection and customer service. NPRM at ¶6.

2. Section 653(b) sets forth the requirements for certification.

same time providing streamlined regulation that is not so burdensome that it snuffs out operator flexibility which is intended to encourage entry into the video marketplace. If Section 653 has the dual goals of both inter-system competition and intra-system competition, as the Commission surmises it does, the CPUC agrees that it will take a delicate balancing act to provide "open video system operators with substantial flexibility in structuring of services offered over their systems, while ensuring that video programming providers that are unaffiliated with an open video system operator are able to obtain access to the systems under just and reasonable terms." (NPRM, ¶10)

The operating principle should be that system operators should not be given unfettered discretion to administer portions of the program in which they stand to gain or lose if they exercise direct control over that portion of the program. The obvious conflict of interest should not be ignored. There must be some built-in safeguards that would serve as a balance to incentives and opportunities by system operators to successfully discriminate against non-affiliated program providers. Any regulation that would allow the system operator to administer the allocation of channel capacity should take this factor into account, and should have some checks and balances to ensure equity.

II. RATES, TERMS AND CONDITIONS OF CARRIAGE

The Commission is charged by §653(b)(1)(A) of the Act with the responsibility for prescribing regulations ensuring that the rates, terms, and conditions for the carriage of video

programming of an open video system are just and reasonable. Comment is requested on whether market incentives and the need to compete with an incumbent cable operator will ensure that negotiated carriage rates are just and reasonable (NPRM, ¶31). The Commission also seeks opinions on an appropriate process for resolving disputes under such an approach, including whether the Commission should issue guidelines setting forth factors on which it will base a just and reasonable determination.

Market incentives and the need to compete alone are insufficient to ensure just and reasonable carriage rates. If there is a level playing field and the participants have equal bargaining power, presumably just and reasonable rates would be a by-product of such a system. There should not be a presumption of reasonableness if some minimum number of programming providers pay the rates, nor if some minimum capacity is taken by unaffiliated programming providers at those rates. The Commission could consider some very general guidelines for reasonableness, and leave the specifics to those in the industry. At a minimum, the open video operator should not be allowed to charge others rates that are greater than the rates it charges its affiliates.

III. THE IMPACT OF PUBLIC, EDUCATIONAL, OR GOVERNMENTAL (PEG) AND "MUST CARRY" OBLIGATIONS

In view of the Act's requirement that PEG and "must-carry" obligations apply to open video system operators, regardless of the status of carriage demand and available capacity, the

Commission in ¶19 seeks comment on the impact of PEG and "must-carry" obligations.[3] The Commission tentatively concludes that such obligations should not be counted against the one-third of capacity that an open video system operator or its affiliate may select, and that neither the system operator nor its affiliate would be "selecting" such programming because the "must carry" obligations are required as a matter of law. These conclusions appear to be reasonable. The system operator or its affiliate should not be penalized because of their legal obligations. Moreover, technically and legally, they would not have "selected" such programming.

IV. CHANNEL SHARING AND POSITIONING ARE INTERRELATED WITH NONDISCRIMINATION REQUIREMENTS.

The Commission asks for comment on how the allowance of channel sharing in Section 653(b)(1)(C) relates to the nondiscrimination requirements of §653(b)(1)(A). NPRM, ¶20. Channel sharing is a means of increasing channel capacity. As noted in ¶37 of the NPRM, the question of whether channel sharing should be required is left to the discretion of open video system operators. The Commission concludes that, at a minimum, the Act requires the Commission to allow an open video system operator to choose how and which programming will be selected for shared channels. The Commission also tentatively concludes that if the

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3. See, Sections 611 of the Communications Act (47 U.S.C. §531), and Sections 614 and 615 (47 U.S.C. §534, 535) respectively.

open video system operator chooses not to participate in the administration of channel sharing arrangements, it should be allowed to select another entity to do so.

Considering that "[p]ermitting channel sharing arrangements...can provide efficiencies to video programming providers and open video system operators, and could increase programming diversity for consumers," it may not be desirable to leave to the discretion of system operators whether channel sharing should be required. (NPRM, ¶36.) If the objective of these provisions is to provide consumer choice and foster competition, it may be preferable for some other entity to make the decision. If, however, system operators are given such broad discretion, their decisions should be examined under the antidiscrimination provisions of the Act. To the extent that they are participants in the system, and yet have some control over others' access to the system, the fair functioning of the open video system would seem to demand it.

The Commission also asks whether channel positioning decisions need to be evaluated under the antidiscrimination provisions of the statute (¶22 of NPRM). Considering that the lower numbered channels may be considered more attractive from the marketing or accessibility standpoint, the CPUC believes that positioning by the system operator should be subjected to the antidiscrimination provisions to ensure fair positioning. This would not be necessary if all of the channels were equally attractive.

V. NOTICE SHOULD BE WIDELY DISSEMINATED.

In ¶14 of the NPRM, the Commission seeks comment on what procedures it should adopt for an open video system operator to follow in notifying video programming providers that it intends to establish an open video system. Notice should be widespread and comprehensive enough that program providers will be apprised of how to obtain carriage, available capacity, and any time limits applicable thereto. Notice should be disseminated to such entities as networks, cable programming providers, community information providers, local newspapers, publications and magazines, trade publications, and the local media.

The Commission should reserve the right to provide supplemental notice, if deemed necessary to comply with general due process standards.

VI. THE LEGAL STANDARD THE COMMISSION SHOULD ADOPT SHOULD NEITHER ENCOURAGE THE FILING OF CLAIMS NOR MAKE IT EXTREMELY DIFFICULT TO BRING LEGITIMATE CLAIMS.

The Commission seeks comments on what standard it should adopt in evaluating claims of unjust or unreasonable discrimination under the open video provisions of the 1996 Act. (NPRM, ¶34). In consideration of the goals of promoting competition, investment, and consumer choice, the Commission should adopt a legal standard that does not have so low a threshold that it in effect encourages the filing of claims. Excessive filing of claims is antithetical to competition, and could bog down the system. At the same time, the legal standard should not be so stringent that persons with legitimate complaints are discouraged from seeking redress of their

grievances. Again, competition would suffer because entrants could be kept out by discrimination or unfair means.

For the above reasons, proof by clear and convincing evidence may be the appropriate standard. This standard would likely discourage unmeritorious claims. Whereas, proof by a preponderance of the evidence i.e., more likely than not that an infraction of the rules occurred, is the lowest standard of proof, and would likely result in a multiplicity of complaints being filed.

VII. INFORMATION PROVIDED TO SUBSCRIBERS

In ¶47 et seq. of the NPRM, the Commission requests comments on interpreting and implementing subsection §653(b)(1)(E) of the Act, whose intent is to prevent discrimination by open video system operators in favor of the system operator or its affiliates regarding information and the way it is provided to subscribers. Specifically, the Commission asks for an interpretation of the phrase "selecting programming" as it is used in that subsection.

A broad reading of the §653(b)(1)(E) could be interpreted as an impediment to advertising by a video system operator of its own or an affiliate's programming, since it would tend to encourage subscribers to select such programming. However, advertising by its very definition is intended to persuade the viewer to make a choice. The CPUC does not believe the language of the provision was intended to prohibit the operator's ability to advertise its own or its affiliates programming, even when it is the only entity dealing directly with end users. Such an

interpretation would thwart the intent of the Act to maximize consumer choice of services. Maximizing consumer choice means informing the consumer of all choices in programming - those of the operator and its affiliates, and those of non-affiliates or competitors.

The CPUC finds the phrase "unreasonably discriminating" to be the controlling language and of greater relevance when interpreting §653(b)(1)(E). It agrees with the Commission's belief that this language is merely a specific application of the non-discrimination requirement contained in §653(B)(1)(A).[4] An open video system operator should be prohibited from unreasonably discriminating **in favor of** itself or its affiliates. However, to achieve nondiscrimination, it is not necessary to impose a blanket prohibition against an operator advertising its own or an affiliate's programming. The result of such a prohibition would be to disadvantage the operator and hinder the dissemination of information necessary to consumers faced with making decisions regarding programming options.

The Commission seeks comments on §653(b)(1)(E)'s prohibition against omitting broadcast stations and unaffiliated programmers from any navigational device, guide or menu, even if the broadcast station or unaffiliated programmer is not a part of the subscriber's package. Again, the preferred result should strike a balance between controlling discriminatory actions on the part of the programmers while ensuring that the Commission's goals of

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4. NPRM, ¶48.

promoting competition, encouraging the development of new technology, and maximizing consumer choices are met.

In this case, a subscriber should not be forced to review volumes of information when merely seeking information on a particular program in the subscriber's package. On the other hand, subscribers should be able to freely access information regarding all services available to them. All communications between a subscriber and an operator should not be burdened with the obligation of providing information on all possible programming options. The objective should be to ensure that information is available when a consumer wants it.

VIII. COST ALLOCATION IN CONJUNCTION WITH CERTIFICATION - PART 64 OF THE COMMISSION'S RULES

California supports the establishment of cost allocation procedures for a local exchange carrier that enters the open video system market. (NPRM, ¶70) The proper allocation of costs between regulated and unregulated services under Part 64 of the Commission's rules assures that ratepayers of regulated services are not subsidizing unregulated competitive services. This is necessary to ensure a level playing field for the competitive market - in this instance the open video systems market.

California urges the Commission to require that any amendments to Cost Allocation Manuals be filed prior to the conclusion of the certification process. California has had experience with short approval processes, but has always required that any cost support be filed before final approval. This allows the California staff two benefits. First, it allows the

staff an opportunity to detect if any anti-competitive pricing is being proposed prior to the approval of a request. Second, it provides the staff with data when allegations of anti-competitive behavior arise. As the role of regulatory agencies changes from monopoly regulation to referees of competition, the second benefit becomes most important.

If the Commission does not require cost data to be filed prior to approval, competitors may file complaints formalizing their allegations and the Commission will have to litigate such complaints. This may cause delays in the Commission's full implementation of the Telecommunications Act. On the other hand, having such information on file in advance will allow the Commission to more expeditiously resolve such allegations and more efficiently implement the Act.

IX. DISPUTE RESOLUTION

In the NPRM, the FCC asks for comment on creating a dispute resolution procedure which resolves issues when parties fail to reach agreement, yet encourages parties to seek resolution. (NPRM, ¶72) In an analogous context, the CPUC has attempted to encourage negotiated settlements by requiring the relevant parties to elevate the dispute to the executive level prior to seeking CPUC mediation.[5] The purpose of this provision is to encourage parties to exhaust internal means of reaching agreement prior to seeking CPUC intervention. Other features of the CPUC's

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5. Decision (D.) 95-12-056, pp. 37-39.

dispute resolution process are: (1) a progression from mediation to arbitration; and (2) a limitation on involvement by parties not directly involved in the dispute. The CPUC believes that the Commission may want to consider similar measures to encourage parties to negotiate and seek intervention only after other avenues have been exhausted.

X. CONCLUSION

California respectfully submits these comments for your consideration in this Open Video Systems proceeding.

Respectfully submitted,

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March 29, 1996

CERTIFICATE OF SERVICE

I, Mary Mack Adu, hereby certify that on this 29th day of March, 1996, a true and correct copy of the forgoing **COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA** was mailed first class, postage prepaid to all known parties of record.

Mary Mack Adu

Mary Mack Adu

/cdl